A. Russo & Sons, Inc. and Teamsters Local 829, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL—CIO, Petitioner. Case 1–RC–20508

September 30, 1999

#### DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On November 7, 1996, the Regional Director for Region 1 issued a Decision and Direction of Election in this proceeding (relevant portions are attached an appendix), in which she found appropriate a unit of all full-time and regular part-time warehouse employees, including truck drivers, order pickers, and processors, employed by the Employer at its Watertown, Massachusetts facility. In finding the petitioned-for unit to be appropriate, the Regional Director, stating that the Board appears to be moving away from the restrictive *A. Harris & Co.*, 116 NLRB 1628 (1956), criteria, declined to apply the standard set forth in *A. Harris* to the combined wholesale and retail operation at issue, and instead applied a traditional community of interest test.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that the smallest appropriate unit must also include the store clerks, cashiers, baggers, and florists who work in its retail operation. The Employer urges the Board to apply the A. Harris standard to the Employer's retail and wholesale operation, relying on Napa Columbus Parts Co., 269 NLRB 1052 (1984). The Employer contends that the retail store employees must be included in the unit found appropriate under either the A. Harris standard or the traditional community of interest analysis. By Order dated December 6, 1996, the Board granted the Employer's request for review. The election was held as scheduled on December 6, 1996, and the ballots were impounded pending the Board's Decision on Review.

The Board has considered the entire record in this case with respect to the issue on review. The question the Board answers today is one specifically left open in *Esco Corp.*, 298 NLRB 837, 841 fn. 7 (1990), i.e., whether *A. Harris* applies where an employer operates on both a wholesale and retail basis. We decide, for the reasons set forth below, no longer to apply the *A. Harris* criteria to wholesale and retail operations, and thus to overrule *Napa Columbus Parts*. Applying the traditional community of interest test, we also affirm the Regional Director's con-

clusion that a unit of warehouse employees at the Employer's facility is appropriate for bargaining.

# Background

The Employer is engaged in the retail and wholesale distribution of fruits, vegetables, flowers, and plants. The Employer houses its wholesale<sup>2</sup> and retail operation in the same facility. The retail store and greenhouse are located in the front of the facility. An office and a processing room (where the produce is prepared) are located just behind the retail store. The warehouse is located in the back of the building, along with a loading dock and various refrigeration rooms and refrigerated trailers where produce is stored.

Warehouse manager Gerald (Joe) Harvey oversees the warehouse/wholesale operation, and retail manager Jody Davis oversees the retail store. Both report to Michael (Tony) Russo, the president of the Employer and an overall supervisor at the facility. The warehouse operation includes 15 to 20 order pickers who pull orders and place them in designated areas on the warehouse floor, clean up refrigeration rooms, and rotate product. It also utilizes 25 truckdrivers who, in addition to driving, load and unload their trucks and clean the warehouse.<sup>3</sup> Finally, 10 to 12 food processors work in the processing room washing, peeling, cutting, and bagging fruits and vegetables.<sup>4</sup>

The retail store operation includes 15 store clerks who help customers; these clerks spend about half of their time retrieving items from the refrigerators in the warehouse to stock the shelves. There are two retail operation florists. One works part-time as a store clerk and part time arranging centerpieces and handling special orders. The other florist works out of the warehouse area preparing bouquets, and all of her product goes into the retail area. There are also 18 cashiers, and 10 baggers who bag produce for customers, carry grocery bags out to the customers' cars, gather carriages, and stock shelves from the warehouse. All of the baggers and six to eight of the cashiers are high school students who work part-time. Most of the Employer's remaining employees are fulltime.

The Regional Director's Findings and Conclusions

The Regional Director found that the warehouse employees sought by the Petitioner share a sufficiently distinct community of interest to warrant their representation in a separate unit. In reaching this conclusion, the Regional Director found that the warehouse employees primarily service the wholesale aspect of the Employer's

<sup>&</sup>lt;sup>1</sup> The Regional Director also found that Phil Amantangelo and Arthur Cruz are not supervisors within the meaning of Sec. 2(11) of the Act. The Regional Director's findings on this issue have not been challenged on review.

<sup>&</sup>lt;sup>2</sup> The Employer's wholesale customers include corporate cafeterias, restaurants, and hospitals.

<sup>&</sup>lt;sup>3</sup> Four or five of the drivers are "market drivers" who deliver product that is used for both the wholesale and retail operation. The rest of the drivers make deliveries to wholesale customers.

<sup>&</sup>lt;sup>4</sup> The food processors work in three shifts, providing coverage from 1 a.m. until about 4 or 5 p.m. Those that work in the morning hours process produce primarily for the wholesale operation and a small amount for the retail store. Those who work in the afternoon process mostly for the retail operation and a small amount for wholesale.

operation, while the remaining employees service only the Employer's retail store. Thus, drivers, order pickers, and processors perform traditional warehouse functions in the back area of the building. The drivers and order pickers go into the retail store only briefly, to obtain a missing item, and the drivers must obtain permission to do so.<sup>5</sup>

The Regional Director further found that the duties of the store clerks, cashiers, and baggers revolve around serving retail customers in a separate area of the building. Cashiers and baggers work exclusively in the retail store, and store clerks spend about half their time in the store. The Regional Director noted that the hours of the store clerks, cashiers, and baggers are tied to the daytime hours of operation of the retail store (8 a.m.-6:30 p.m.), and that many drivers, order pickers, and processors come to work in the middle of the night and finish working for the day by the early afternoon.<sup>7</sup> The warehouse and store employees are subject to separate immediate supervision. Many of the cashiers and all of the baggers are part-time high school students who are paid less than the warehouse employees and, unlike the vast majority of the warehouse employees, receive no benefits.8 The Regional Director found that the two groups of employees wear different uniforms, and that drivers have unique interests, such as having financial responsibility for driving accidents.

The Regional Director recognized that there is some integration of the Employer's wholesale and retail operations. Market drivers deliver product which is used for both aspects of the Employer's operation, processors process product for both wholesale and retail use, and store clerks go into the warehouse to stock the retail store shelves from the same inventory that is used for wholesale distribution. The Regional Director found, however, that, on balance, the primary focus of each group of employees on either the wholesale or the retail aspect of the business is sufficiently distinct that the Petitioner should not be required to represent all of the Employer's employees in an overall unit. She found that the instances where drivers and processors have filled in at the store and where store clerks have assisted with warehouse work are insufficient in number and substance to defeat the appropriateness of the unit sought. Finally, she noted that the fact that three employees out of a total complement of 95 to 100 employees have transferred between the two groups is insufficient to require an overall unit.

# The Applicability of A. Harris to Wholesale and Retail Operations

In A. Harris, the Board reaffirmed its prior recognition of the functional distinction between employees in the retail department store industry who perform warehouse functions and employees performing other functions. In that case, the Board rejected the contention that the employer's organizational integration of its operations precluded the establishment of any unit less than storewide in scope. The Board set forth a restrictive test, consistent with its policy at that time of favoring wall-to-wall units in the retail industry, that warehouse units may be appropriate in a retail operation if certain criteria are met. Under this test, separate warehouse units would be permitted where the employer's warehousing operation is geographically separated from its retail store operations; there is separate supervision of the employees engaged in warehousing functions; and there is no substantial integration among the warehousing employees and those engaged in other store functions. Applying this test, the Board concluded that the establishment of a separate unit of warehouse employees was appropriate in A. Harris.

Later Board decisions have adhered to the *A. Harris* criteria in the retail industry. Two post-*A. Harris* Board decisions applied the *A. Harris* criteria, without explanation, to a combined wholesale and retail operation (*Napa Columbus Parts*, supra) and a wholesale operation (*Roskin Bros., Inc.*, 274 NLRB 413 (1985)), finding the petitioned-for warehouse units to be inappropriate.

Subsequently, in *NLRB v. Great Western Produce*, 839 F.2d 555 (9th Cir. 1988), enfg. 282 NLRB No. 17 (1986) (not included in bound volumes of Board decisions), the court upheld the Board's use of the community of interest standard in determining that a separate unit of warehouse employees, drivers, and mechanics was appropriate in a wholesale operation. The court recognized that the Board had not been consistent in its application of *A. Harris* to

<sup>&</sup>lt;sup>5</sup> The Employer correctly claims that the record does not establish that order pickers need permission to go into the retail store.

<sup>&</sup>lt;sup>6</sup> Store clerks work in two shifts beginning at 5:30 a.m. until 6:30 p.m.; cashiers cover three shifts from 7 a.m. until closing; and baggers work from 2 p.m. until closing.

<sup>&</sup>lt;sup>7</sup> Order pickers generally work from 11 p.m. or 12 a.m. until 9 or 10 a.m. The market truckdrivers start at 3 or 4 a.m. and finish around 3 or 3:30 p.m. The remaining drivers begin at 5 to 7 a.m. and work for 8 or 10 hours. The food processors work in three shifts beginning at 1 a.m. and finishing at 4 or 5 p.m.

<sup>&</sup>lt;sup>8</sup> Baggers start at \$5 an hour, and cashiers start at \$5.50. By contrast, store clerks earn between \$8 to \$14 per hour; food processors \$6 to \$10; and drivers and order pickers \$8 to \$13.

<sup>&</sup>lt;sup>9</sup> Warehouse employees bag groceries and sell Christmas trees only on rare occasions. One store clerk drives a truck only on Sundays if needed,

and another has done so occasionally. Only one store clerk performs warehouse and driving work on a regular and frequent basis.

<sup>&</sup>lt;sup>10</sup> See, e.g., Sears Roebuck & Co., 117 NLRB 133 (1957); Montgomery Ward & Co., 181 NLRB 132 (1970); Roberds, Inc., 272 NLRB 1318 (1984); and Charrette Drafting Supplies, 275 NLRB 1294 (1985).

<sup>11</sup> In *Napa*, the petitioner sought a warehouse unit in the employer's warehouse distribution center, excluding the employees at the main counter sales store located within the distribution center. The employer also had 19 local sales outlets. The Board found that the warehouse employees did not have a sufficiently separate and distinct community of interest to warrant their placement in a separate unit. In making this finding, the Board noted, inter alia, that other employees besides the warehouse employees frequently assisted in performing warehouse work, and the duties of the local store employees primarily involved warehouse-type functions. In addition, the main counter employees, who worked in the same building as the warehouse employees, were frequently required to enter the warehouse area and pull stock to help fill orders for both main counter and local store customers.

wholesale operations. The court noted that although the Board had applied *A. Harris* in *Roskin* and *Napa Columbus Parts*, the Board had neither applied nor discussed *A. Harris* in a number of other wholesale warehouse cases. Moreover, the court determined that no established Board policy could be inferred from *Roskin* and *Napa Columbus Parts* as "those cases simply applied *Harris* without any examination of whether the standard should be extended from retail to wholesale operations." 839 F.2d at 558. The court further suggested that the Board clarify its approach to wholesale warehouse employees.

Thereafter, in Esco Corp., 298 NRLB 837 (1990), the Board, acknowledging the Ninth Circuit's suggestion in Great Western Produce, overruled Roskin Bros. and announced that it would no longer apply A. Harris to wholesale or nonretail operations. The Board reasoned that the facts in A. Harris were limited to a retail operation and nothing in the decision indicated it was intended to apply to nonretail operations. The Board then noted that the restrictive test applied in A. Harris was consistent with the Board's policy at that time favoring wall-to-wall units in the retail industry, citing John's Bargain Stores Corp., 160 NLRB 1519, 1522 (1966); and Stern's Paramus, 150 NLRB 799, 803 (1965). Further, the Board reasoned that, except for Roskin, no published decision had ever applied the A. Harris criteria to wholesale operations. Although Roskin applied A. Harris, the Board noted that it did so without addressing or discussing the issue. Finally, the Board reasoned that the extension of the A. Harris criteria to nonretail operations would be inconsistent with the Board's usual approach to unit determinations in other industries, which considers all relevant community of interest factors, and not just those set forth under A. Harris. The Board specifically left open the issue of whether A. Harris applies where an employer's operation is both wholesale and retail, as in Napa Columbus Parts, 298 NLRB at 841 fn. 7.12

Turning to the issue specifically left open in *Esco*, and squarely presented here, we hold, for reasons similar to those cited by the Board in *Esco*, that *A. Harris* does not apply to combination retail and wholesale operations. First, as stated by the Board in *Esco*, the facts in *A. Harris* were limited to a retail operation; nothing in the decision indicates that it was intended to apply to combination wholesale and retail operations. Second, except for *Napa Columbus Parts*, no published decision has ever applied the *A. Harris* criteria to a combined retail and wholesale operation. <sup>13</sup> As the Board observed in *Esco*, in *Lily Tulip Tulip Tulip States*.

Cup Corp., 124 NLRB 982 (1959), the Board (including two members of the full Board deciding A. Harris) dismissed a petition for a warehouse unit in a manufacturing operation, finding that A. Harris was inapplicable to operations other than retail because that case "set forth restrictive criteria governing the establishments of warehouse units in retail department stores only." Esco, 298 NLRB at 840–841, quoting Lily Tulip, 124 NLRB at 984 fn. 2. As for Napa Columbus Parts, although the Board's decision recites the A. Harris test, the analysis itself in large measure reflects a traditional community of interest approach. Moreover, the Board did not address or discuss the issue of whether it was appropriate to apply the A. Harris test to combination retail and wholesale operations. 269 NLRB at 1052–1054.

Finally, as discussed in *Esco*, extension of the *A. Harris* criteria to combination wholesale and retail operations would be inconsistent with the Board's usual approach to unit determinations in nonretail industries. Under the usual community of interest approach, the Board normally considers a broad range of factors, rather than deciding the case based solely on whether the specific factors enumerated in *A. Harris* are present. As in *Esco*, we see no basis for limiting our traditional community of interest analysis in this manner. Accordingly, in deciding whether a warehouse unit is appropriate in a combination wholesale and retail operation, the Board will examine all relevant community of interest factors.<sup>14</sup>

Our dissenting colleagues rely on the fact that *Napa* has been on the books for 15 years and is therefore established precedent. Contrary to the dissents, we view *Napa* as an aberration. *Napa* failed to mention that *A. Harris* was designed to apply only to retail store warehouse operations, let alone to explain why it should apply to mixed wholesale/retail operations. During the 15 years from the *Napa* decision until the present, no other published Board case has applied *A. Harris* to mixed wholesale/retail operations. We therefore believe, contrary to our dissenting colleagues, that compelling policy considerations support the overruling of *Napa*.

# **Analysis and Concluding Findings**

Applying the traditional factors, and for the reasons set forth by the Regional Director, 15 we agree with the Re-

<sup>&</sup>lt;sup>12</sup> In *Esco*, the Board reconsidered its opinion in *A. Harris* by assuming, "without deciding, the continued application of *A. Harris* to unit determinations in the retail industry." Id. at 840.

<sup>&</sup>lt;sup>13</sup> But see, *Big Buck Lumber*, 241 NLRB 639 (1979). In that case, the employer was engaged in the distribution and retail sale of home building materials at its Illinois location. Although not specifically described as such in the *Big Buck Lumber* decision, the Regional Director's decision in *Wickes Furniture*, 255 NLRB 545, 548 (1981), adopted by the Board, referred to the employer as a combination wholesale and retail operation.

In *Big Buck Lumber*, the Board approved a petitioned-for unit of yardmen and drivers, where those employees alone performed a true warehousing function as their primary employment activity, while the other employees sought to be included by the employer engaged in direct sales or activities ancillary to sales, the respective job responsibilities of the two groups tied them for the majority of their worktime to different parts of the facility, and they had separate immediate supervision. Although the Board did not cite *A. Harris* but referred generally to the community of interest test, the *A. Harris* criteria were apparently considered.

<sup>&</sup>lt;sup>14</sup> To the extent that *Napa Columbus Parts* was decided under the *A. Harris* criteria, it is overruled.

<sup>&</sup>lt;sup>15</sup> We find it unnecessary to rely on the Regional Director's finding that the warehouse employees wear unique uniforms, as each classification dresses differently from the others.

gional Director that the petitioned-for warehouse unit, consisting of truckdrivers, order pickers, and processors, constitutes an appropriate unit for bargaining. Thus, the warehouse employees primarily service the wholesale aspect of the Employer's operation; work under separate immediate supervision; and have different work hours from those of the retail employees. Many of the cashiers and baggers in the retail store are part-time high school students who are, for the most part, paid less than the warehouse employees and do not receive benefits, while the warehouse employees are mostly full-time employees. Finally, the level of interchange is not sufficiently substantial to require the inclusion of the retail store employees in the unit. See *Big Buck Lumber*, 241 NLRB 639 (1979).

#### **ORDER**

The Regional Director's decision is affirmed, as modified, and the case is remanded to the Regional Director for further appropriate action.

# MEMBER HURTGEN, dissenting.

The Employer is engaged in the retail/wholesale distribution of fruits, vegetables, flowers, and plants. The Petitioner seeks a unit confined to warehouse employees. It is clear that, under extant law, this unit is not appropriate. My colleagues would reverse that extant law. I would uphold that law, and find the unit to be inappropriate.

The extant law is set forth in *Napa Columbus Parts Co.*, 269 NLRB 1052 (1984). In that case, the Board applied the *A-Harris*<sup>1</sup> criteria to a wholesale/retail operation. That is, *A. Harris* involved a retail operation, and the Board in *Napa* extended the doctrine to a combined wholesale/retail operation. Thus, in both types of operations, certain defined criteria must be met in order for a warehouse to be separately appropriate.<sup>2</sup>

My colleagues apparently concede that those criteria are not met here. Thus, in order to make this unit appropriate, my colleagues reverse *Napa*.

*Napa* has been on the books for 15 years. In the interests of stability and predictability of the law, precedent should not be changed in the absence of compelling policy considerations. There are no such considerations here.

My colleagues say that a reversal of *Napa* is necessitated by the court's decision in *NLRB v. Great Western Produce*, 839 F.2d 555 (9th Cir. 1988). However, that case involved a solely wholesale operation. The court simply questioned whether *A. Harris* should apply to a solely wholesale operation.

Thereafter, in *Esco*, 298 NLRB 837 (1990), the Board acknowledged the court's language, and decided that *A. Harris* should not be applied to a solely wholesale opera-

tion. However, neither *Great Western* nor *Esco* involves a combined retail/wholesale operation, precisely the operation involved herein. Thus, it cannot be said that these cases compel, or even warrant, the abandonment of the *Napa* precedent.

I recognize that the *A. Harris* rules were originally formulated, in part, to reflect the fact that a wall-to-wall unit is the optimum unit in a retail store operation. Thus, it may make sense not to apply *A. Harris* to a solely wholesale operation. However, where, as here, the operation is retail/wholesale, and the wholesale operation is fully integrated into the retail operation, it makes sense to apply *A. Harris*.

I do not believe that the *A-Harris-Napa* analysis is inconsistent with a community-of-interest approach. Rather, that analysis takes into account community-of-interest facts, and the character of a retail/wholesale operation. Based on these factors, *A. Harris-Napa* formulates general rules for guidance. I would apply those rules here.<sup>3</sup>

My colleagues say that, during the 15 years of *Napa*, no Board case has applied *A. Harris* to wholesale/retail operations. They fail to note that no Board case has failed to do so. Thus, my colleagues cannot escape the fact that *Napa* has been the law for 15 years, and they wish to change it. I believe that the *Napa* result was and is reasonable, and that "compelling considerations" do not support the abrupt departure therefrom.

The instant case is a good illustration of the appropriateness of the A. Harris-Napa test. In finding that the warehouse unit here is not separately appropriate, I note the following: (1) the warehouse operation is in the same building as the retail/wholesale store; (2) Employer President Russo sets the pay rate for warehouse employees and store employees; (3) all employees are hourly paid; (4) all employees receive the same fringe benefits (e.g. vacation, sick days, health insurance); (5) the order-pickers pull orders from the warehouse and the retail store; (6) the processors handle fruits and vegetables for both the warehouse and the store; (7) store clerks spend about half their time in the warehouse, retrieving items for the store; (8) the store clerks work in the warehouse when it is busy, and they help in the unloading of trucks; and (9) the baggers carry groceries from the store to customer cars, and they perform work in the warehouse.

Based on all of the above, and on extant law, the unit here is not appropriate. Rather than reversing that law, I would apply that law. I would therefore dismiss the petition.

### MEMBER BRAME, dissenting.

At its Watertown, Massachusetts facility, the Employer operates a produce and plant business selling fruits, vegetables, flowers, and plants to both retail and wholesale customers. It has approximately 100 employees, including order pickers, food processors, truckdrivers, store clerks,

<sup>&</sup>lt;sup>1</sup> A. Harris & Co., 116 NLRB 1628 (1956).

<sup>&</sup>lt;sup>2</sup> The criteria are: (1) the warehousing operation is geographically separated from retail store operation; (2) there is separate supervision of the employees engaged in the warehouse operation; and (3) there is no substantial integration among the warehouse employees and those engaged in other store functions.

<sup>&</sup>lt;sup>3</sup> Accordingly, I do not regard *Napa* as an "aberration."

florists, cashiers, and baggers. By overruling *Napa Columbus Parts Co.*<sup>1</sup> my colleagues in the majority find appropriate the petitioned-for unit limited to the 15–20 order pickers, 10–12 food processors, and 25 truckdrivers. Because I would adhere to the Board's *Napa* decision, I reject this unit determination and would include the store clerk, cashier, bagger, and florist classifications in the unit as well.<sup>2</sup>

In *Napa*, the Board turned down a similar unit request from a union where Napa's warehousing operation in the Columbus, Ohio area was not geographically separated from its retail store operations and its warehouse employees were commonly supervised and substantially integrated with those individuals engaged in other retail store functions for Napa. The Board emphasized that factors involving work location, supervision, and job functions were central to its ultimate conclusion that the Napa warehouse employees did not share a community of interest sufficiently distinct from that shared by employees engaged in Napa's retail operations. This kind of approach was not unique and logically followed the course first taken for businesses with retail operations by the unanimous Board in *A. Harris*<sup>3</sup> over 40 years ago.

In A. Harris, the Board indicated that it had reviewed cases seeking less than a storewide unit in the retail industry.4 Its examination uncovered three factors—work location, supervision, and job functions—that generally influenced the outcome of the unit question in those cases. The Board summarized its findings that separate warehousing units for businesses engaged in a retail operation are generally inappropriate unless "the employer's warehousing operation is (1) geographically separated from its retail store operations; (2) there is separate supervision of the employees engaged in warehousing functions; and (3) there is no substantial integration among the warehousing employees and those engaged in other store functions." Until now, the Board has followed this approach taken in A. Harris in determining appropriate units where the employer is engaged in retail operations in whole, as in A. Harris, or in part, as in Napa.

The majority does not dispute that the application of the *A. Harris* criteria favor the storewide unit here. With respect to work location, the Employer conducts its retail and wholesale operations at a single facility. The front portion of this building is devoted to the Employer's retail store and greenhouse; behind the retail store is an office and processing room, where the produce is prepared; and the warehouse is in the back of the building. The Employer's retail, warehouse, and processing areas are all on the same floor and the employees freely walk back and

forth between these areas to perform their job duties in the course of their workday. Regarding employee supervision, the warehouse manager generally oversees the operations that are performed in the warehouse and food processing areas, while the retail manager generally oversees the operations that are performed in the retail area. However, both managers have the authority to direct the work of and discipline all the employees. Both managers also report to the on-site company president who exercises regular hands-on supervisory authority over all the employees. In terms of integration of job functions, the retail and warehouse employees have regular contact with each other. From the Employer's common inventory, the order pickers pull orders for both the warehouse and retail operations. The food processors handle and prepare fruits and vegetables for both wholesale and retail customers. The store clerks and baggers, who service customers in the front portion of the facility, may also work in the warehouse portion by participating in food processing operations, unloading trucks, or helping out when it is busy there. The store clerks spend about half their time in the warehouse, retrieving items for the store. Drivers and food processors have also filled in at the store.

The majority claims that "compelling considerations" support the overruling of *Napa*. They argue that *Napa* is an aberration because (1) *A. Harris* was designed only to apply to retail operations; (2) the Board in *Napa* failed to explain why the *A. Harris* criteria should apply to mixed retail and wholesale operations; and (3) the application of the *A. Harris* criteria to employers with combined retail and wholesale operations is inconsistent with the usual community of interest approach used by the Board in making unit determinations in nonretail industries. None of these arguments is persuasive.

My colleagues in the majority provide insufficient support for their bare assertion that the *A. Harris* factors were designed for a business without any wholesale component. While it is true that *A. Harris* involved an employer who was engaged in retail operations, the Board did not explicitly or implicitly limit the force of its reasoning in the manner endorsed by the majority today. Nor do either *NLRB v. Great Western Produce*<sup>6</sup> or *Esco Corp.*, cited by the majority, compel, or even warrant, the abandonment of *Napa*. In affirming the Board's finding that a separate unit of warehouse employees of a wholesale produce distributor was appropriate, the court in *Great Western Produce* was careful not to reject the application of the *A. Harris* 

<sup>&</sup>lt;sup>1</sup> 269 NLRB 1052 (1984).

<sup>&</sup>lt;sup>2</sup> I note that the Petitioner indicated that it was willing to proceed to an election in the larger plantwide unit if the Board determined that the separate unit of warehouse employees is inappropriate.

<sup>3 116</sup> NLRB 1628 (1956).

<sup>&</sup>lt;sup>4</sup> Id. at fn. 9.

<sup>&</sup>lt;sup>5</sup> The majority also attacks the *Napa* decision on the basis that no other published Board decision has applied the *A. Harris* criteria to a situation involving an employer with combined retail and wholesale operations. This attack has no merit because the majority fails to acknowledge that no Board decision, published or unpublished, has failed to do so. For 15 years, *Napa* has unquestionably been the recognized precedent in this area and, until today, has not been criticized in any of the Board's published decisions

<sup>6 839</sup> F.2d 555 (9th Cir. 1988).

<sup>&</sup>lt;sup>7</sup> 298 NLRB 837 (1990).

criteria for businesses with a combination of retail and wholesale operations. The court simply questioned whether the *A. Harris* criteria should apply to a solely wholesale operation. Similarly, in *Esco*, where the Board decided that it would no longer apply the *A. Harris* criteria to a solely wholesale operation, it specifically refused to pass on whether *A. Harris* applies if the employer's operation is both wholesale and retail, as in *Napa*.

While I do not disagree with the Board's decision not to apply the A. Harris criteria to a solely wholesale operation like *Esco*, it makes little sense for us to dispose of the A. Harris criteria when dealing with employer operations that have a significant retail component like those in this case and where the wholesale part of the employer's operations is fully integrated into its retail part. The majority fails to explain why the significant retail component of the Employer's operations does not activate A. Harris on its own. They incorrectly start with the premise that A. Harris does not apply in the wholesale setting and then they work backward to eliminate the application of A. Harris from the combined retail/wholesale setting. Instead, the proper inquiry should start with the premise that the A. Harris criteria applies to retail operations since that has been the law since 1956. From this premise, one should then move forward to determine if a combined retail/wholesale business retains enough of the retail aspect for the A. Harris criteria to apply in that mixed setting. In other words, the majority never addresses the question whether the combined retail/wholesale operation is closer to retail or wholesale. The majority just assumes that the combined operations must be wholesale and must come within the rationale of Esco.

The majority's rejection of *Napa* seems to be driven by a dislike for industry rules. Such rules, however, are only a recognition of a recurring factual pattern which should give rise to the same result in each case, and maintenance of rules provide guidance to the parties and consistency to our decisions.

Indeed, unlike the majority, I see no tension between the application of the *A. Harris* criteria to employers like Napa and the Board's community-of-interest test. Like the community of interest test, the *A. Harris* criteria takes into account the character of the employer's business and focuses on matters such as work location, supervision, and integration of job functions that have consistently been helpful to the Board in determining whether one group of employees has a separate and distinct identity from another employee group. Furthermore, contrary to the majority, I think that the same storewide unit result would be reached if we were to apply the community-of-interest approach to the instant facts. The Employer's operations are at one location; there they are functionally integrated and interdependent. The retail store employees and ware-

house employees share some supervision, have similar work skills, have frequent work contact with each other, and have similar working conditions. This factual scenario fully supports the larger employee unit.

Accordingly, I would reverse the Regional Director and find the petitioned-for unit to be inappropriate.

#### **APPENDIX**

#### DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit of the Employer's warehouse employees, including drivers, order pickers, and processors. The Employer maintains that the smallest appropriate unit must also include the employees who work in its retail operation, i.e., store clerks, cashiers, baggers, and florists. The Petitioner further contends that two individuals, Arthur Cruz and Phil Amantangelo, should be excluded from the unit as statutory supervisors, while the Employer contends that they are both nonsupervisory employees.

# Appropriate Unit

The Employer operates its produce and plant business out of a facility located in Watertown, Massachusetts. The Employer sells to wholesale customers such as corporate cafeterias, restaurants, and hospitals, and also has a retail operation located at the same facility. The front portion of the Employer's building is devoted to the retail store and greenhouse. Flowers, plants, shrubs, Christmas trees, and seasonal items are displayed outside, in front of and on the sides of the building. Just behind the retail store is an office and the processing room, where the produce is prepared. In the back of the building is a warehouse with a loading dock, and various refrigeration rooms and refrigerated trailers where produce is stored.

Michael (Tony) Russo is president of the Employer, and his brother Olgo Russo Jr. is its vice president. Their father, Olgo Russo Sr., who was formerly the Employer's president, is now semiretired, but still works in the Employer's business. Retail Manager Jody Davis and Warehouse Manager Gerald (Joe) Harvey report to Tony Russo. Victor Montero, who is in charge of the office, also reports to Tony Russo.<sup>2</sup>

Harvey oversees the warehouse/wholesale operation, which includes truckdrivers, order pickers, and processors. There are about 15 to 20 order pickers who pull orders and set them in designated areas on the warehouse floor. They also clean up the refrigeration rooms and rotate product. Order pickers start work around 11 p.m. or midnight and work until all the orders are pulled, which is generally around 9 or 10 a.m. or later if it is busy. All of the order pickers except for one are full-time employees.

Harvey dispatches the Employer's 25 truckdrivers. Four or five of them are "market drivers" who pick up product from a regional wholesale market and deliver it to the Employer's warehouse. The market drivers deliver product that is used for both the wholesale and retail operation. They start work between 3 and

<sup>8</sup> Id. at 841 fn. 7.

<sup>&</sup>lt;sup>9</sup> See Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).

<sup>&</sup>lt;sup>1</sup> The parties have stipulated, and I find, that Michael Russo, Olgo Russo Jr., and Olgo Russo Sr. are managers and statutory supervisors who should be excluded from any unit found appropriate.

<sup>&</sup>lt;sup>2</sup> The parties have stipulated, and I find, that Davis, Harvey, and Montero are statutory supervisors who should be excluded from any unit found appropriate. The parties have also stipulated, and I find, that Ida Napolitano should be excluded from the unit as an office clerical employee.

4 a.m. and work until they are done, usually around 3 or 3:30 p.m. The rest of the drivers make deliveries to wholesale customers. They start work between 5 and 7 a.m. and work until all the orders are delivered, about 8 to 10 hours. The drivers load and unload their trucks and clean up the warehouse. They work 5 to 6 days a week, Monday through Saturday. Some drivers have a commercial driver's license (CDL), but many of the Employer's trucks can be driven without a CDL. The vast majority of the drivers are full-time employees, while two to three of them work part-time.

Ten to twelve food processors work in the processing room, where they wash, peel, cut, and bag fruits and vegetables. They work in three shifts, providing coverage from about 1 a.m. until about 4 to 5 p.m. Those who work in the morning report to Harvey and process produce primarily for the wholesale operation and a small amount for the retail store. Those who work in the afternoon process mostly for the retail operation and a small amount for wholesale. Processors may also stock shelves in the retail store. Most are full-time workers.

The retail store is open from 8 a.m. to about 6:30 p.m. 7 days a week. About 15 store clerks help customers and spend about half their time retrieving items from the refrigerators in the warehouse to stock the shelves. They obtain the produce from the same inventory used to fill wholesale orders. Two florists work in the warehouse area where they unload flower trucks and prepare centerpieces and bouquets. Eighteen cashiers ring up customers. Ten baggers bag produce for customers, carry grocery bags out to customers' cars, gather carriages, and stock shelves from the warehouse. Retail Manager Jody Davis schedules the shifts for the store clerks, cashiers, and baggers. Store clerks work in two shifts covering the period from 5:30 a.m. to closing at 6:30 p.m. Thirteen are full-time employees and two work part-time. Cashiers work in three shifts from 7 a.m. to closing. Six to eight of them are high school students who work part time. The baggers are all high school students who work after school, from 2 p.m. to closing, a total of 12 to 20 hours per week.

Both order pickers and drivers regularly go into the retail store to obtain items missing from the warehouse needed to fill an order. They need permission to do so, however, and it takes only about a minute to take what they need and leave. Two drivers testified, however, that Olgo Russo Jr. has told them to stay out of the store, and Harvey testified that he has told employees not to be in the store if he thinks they are not working. There was a sign near the office for a while that said that employees should not make purchases in the retail store until their work day was done.

Jody Davis testified that processors may be used as baggers during the holiday season, and that three drivers have, on occasion, bagged groceries in the retail store. One of them, George Miller, testified that he has bagged groceries twice in three years, for 1-1/2 to 2 hours on a holiday. Driver David Milliken testified that he has bagged groceries once in 3 years, on his first day of employment, for 1-1/2 hours. Driver Jeff Comeau has helped sell Christmas trees for about 20 hours over two Christmas seasons, and driver David Milliken sold Christmas trees for 3 hours 2 years ago.

Store clerks do processing work if the processors are gone or are busy. Store clerks, baggers, and processors may help drivers unload plants. Store clerk Lionel Medina helps pick orders each morning before working in the store and also makes deliveries 3 to 5 days a week. Store clerk Dominick Restango works as an order picker and driver on Sundays, when the wholesale opera-

tion is technically closed, but customers call in for wholesale orders anyway. Store clerk Cruz Pamales has driven a truck on occasion.

A few employees have transferred between warehouse and retail jobs. Billy Strahan started in the warehouse, but now works as a store clerk. He still works in the warehouse when the Employer is short of order pickers. Driver Brian Flynn started as a florist and still helps with flower preparation at the end of the day. Hector Rivas started as a processor and now works as a store clerk

All of the employees in question are hourly paid. Tony Russo sets the rates of pay for drivers, order pickers, processors, store clerks, and florists. Jody Davis sets pay rates for cashiers and baggers. The drivers and order pickers are paid between \$8 and \$13 per hour, processors are paid \$6 to \$10 per hour, and store clerks are paid \$8 to \$14 per hour. Cashiers start at \$5.50 and baggers at \$5 per hour. Only full-time employees are eligible for benefits, which are the same for both retail and warehouse employees, and which include holiday pay, sick days, vacation, and health insurance. Drivers must pay a \$500 insurance deductible if they are found to be at fault in a truck accident.

Warehouse employees tell Harvey when they want to take vacation time and would see Harvey or Montero about a problem with their timecard. Davis and Harvey have authority to suspend employees. Drivers wear khaki pants and a green or brown shirt and are charged \$2.85 per week for their uniform. Order pickers do not wear uniforms. Processors wear white jackets, and retail employees wear red and green polo shirts. The coats and shirts are loaned to employees by the Employer. Retail and warehouse employees punch in at the same timeclock and have the use of a common lunchroom on the second floor of the building. There are separate bulletin boards for warehouse and retail employees. Prior to the start of the organizing drive by the Petitioner that led to the filing of the petition in this matter, Tony Russo called meetings for drivers, order pickers, and processors to discuss job expectations and never held meetings for warehouse and retail employees together.

The Employer contends that under the Board's decision in A. Harris & Co.<sup>3</sup> and subsequent cases, only a plantwide unit is appropriate here. In A. Harris, the Board held that a warehouse unit is appropriate in a retail operation only if (1) the warehouse is geographically separate from the retail store operation; (2) the warehouse employees are separately supervised; and (3) there is no substantial integration of the warehouse and retail employees. Two subsequent Board decisions applied A. Harris, without explanation, to a wholesale operation (Roskin Bros., Inc.), and to a combined wholesale and retail operation (Napa Columbus Parts Co.). In Napa, which involved a combined wholesale and retail distributor of auto parts, the Board found a warehouse unit inappropriate where, inter alia, employees other than warehouse employees frequently assisted with warehouse work, and "main counter" (i.e., retail store) employees who worked in the same building were frequently required to enter the warehouse area to pull stock to fill orders for retail customers.

In 1990, the Board decided *Esco Corp.*, in which it overruled *Roskin Bros.* and announced that it would no longer apply *A. Harris* to wholesale or nonretail operations; rather, the Board

<sup>&</sup>lt;sup>3</sup> 116 NLRB 1628 (1956).

<sup>&</sup>lt;sup>4</sup> 274 NLRB 413 (1985).

<sup>&</sup>lt;sup>5</sup> 269 NLRB 1052 (1984).

<sup>6 298</sup> NLRB 837, 840-841 (1990).

decided to employ a traditional community-of-interest analysis in such cases. In reaching its decision, the Board explained that the restrictive *A. Harris* test was consistent with the Board's policy at the time favoring wall-to-wall units in the retail industry, that *Roskin* had applied *A. Harris* to a wholesale operation without addressing the issue, and that extension of the *A. Harris* criteria to nonretail industries would be inconsistent with its usual approach to unit determinations in other industries.

The Board in *Esco Corp*. declined to decide whether *A. Harris* should apply to a combined wholesale/retail operation, as in *Napa Columbus Parts*, since that issue was not before it in *Esco Corp*. It did suggest that no established policy could be inferred from *Napa Columbus Parts* because, like *Roskin*, *Napa* simply applied *A. Harris* without any examination of whether the standard should be extended beyond retail operations. Because the Board appears to be moving away from the restrictive *A. Harris* criteria, I decline to apply that standard to the combined wholesale/retail operation at issue here and will consider traditional community-of-interest factors in reaching a unit determination.

"Where the retailing and warehousing operations of an employer coexist in a single setting, the Board must determine whether warehouse employees, when sought by a petitioner, possess such a distinct community of interest as to warrant their inclusion in a separate unit." Big Buck Lumber. In Big Buck Lumber, the Board approved a petitioned-for unit of yardmen and drivers, where those employees alone performed a true warehousing function as their primary employment activity, while the other employees sought to be included by the Employer engaged in direct sales or activities ancillary to sales, the respective job responsibilities of the two groups tied them for the majority of their worktime to different parts of the facility, and they had separate immediate supervision.

I find that the warehouse employees sought by the Petitioner here share a sufficiently distinct community of interest to warrant their representation in a separate unit. In reaching this conclusion I note that the warehouse employees primarily service the wholesale aspect of the Employer's operation, while the remaining employees service only the Employer's retail store. Thus, drivers, order pickers, and processors perform traditional warehouse functions in the back area of the building. The drivers and order

pickers go into the retail store only briefly, to obtain a missing item, and only after obtaining permission to do so. The duties of the store clerks, cashiers, and baggers revolve around serving retail customers in a separate area of the building. Cashiers and baggers work exclusively in the retail store, and store clerks spend about half their time in the store. The hours of the store clerks, cashiers, and baggers are tied to the daytime hours of operation of the retail store, while many drivers, order pickers, and processors come to work in the middle of the night and are finished working for the day by the early afternoon. The warehouse employees and store employees are subject to separate immediate supervision. Many of the cashiers and all of the baggers are part-time high school students who are much lower paid than the warehouse employees and, unlike the vast majority of the warehouse employees, receive no benefits. The two groups of employees have different uniforms, and drivers have unique interests, such as having to make payments for their uniforms and having financial responsibility for driving accidents.

I recognize that there is some integration of the Employer's wholesale and retail operations. Thus, market drivers deliver product which is used for both aspects of the Employer's operation, processors process product for both wholesale and retail use, and store clerks go into the warehouse to stock the retail store shelves from the same inventory which is used for wholesale distribution. On balance, however, I find that the primary focus of each group of employees on the wholesale or retail aspect of the business is sufficiently distinct that the Petitioner should not be required to represent all of the Employer's employees in an overall unit. I find that the instances where drivers and processors have filled in at the store and where store clerks have assisted with warehouse work are insufficient in number and substance to defeat the appropriateness of the unit sought. 11 Finally, the fact that three employees out of a total complement of 95 to 100 employees have transferred between the two groups is insufficient to require an overall unit. Big Buck Lumber. 1

<sup>&</sup>lt;sup>7</sup> Id. at 841 fn. 7.

 $<sup>^8</sup>$  Id. at 840, citing NLRB v. Great Western Produce, 839 F.2d 555 (9th Cir. 1988).

<sup>&</sup>lt;sup>9</sup> The Board also noted in *Esco* that it was assuming, without deciding, the continued applicability of *A. Harris* to unit determinations in the retail industry.

<sup>10 241</sup> NLRB 639, 641 (1979).

Warehouse employees bag groceries and sell Christmas trees only on rare occasions. One store clerk drives a truck only on Sundays if needed, and another has done so occasionally. Only one store clerk, Lionel Medina, performs warehouse and driving work on a regular and frequent basis.

<sup>&</sup>lt;sup>12</sup> Supra at fn. 10.